U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEAL OF	)	
ACCESS Systems, Inc.	)	Docket No. SIZ-2007-02-02-04
Appellant	)	Decided: April 4, 2007
Solicitation No. USSS040042 U.S. Secret Service Information Resources Mgmt. Division Washington, D.C.	)	

APPEARANCES

Ralph C. Thomas III, Esq. and Ronald S. Perlman, Esq., Washington, D.C., and John J. Jacko, III, Esq., Philadelphia, Pennsylvania, Buchanan Ingersoll & Rooney PC, for Appellant.

Laurel A. Hockey, Esq., Cohen Mohr, LLP, Washington, D.C., for EMW, Inc.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal stems from Request for Proposal No. USSS040042 (RFP) issued by the United States Secret Service, Information Resources Management Division (USSS). The RFP anticipated a contract for Computer Facilities Management Services. On October 31, 2006, the Contracting Officer (CO) for USSS notified the unsuccessful offeror that ACCESS Systems, Inc. (Appellant or ACCESS) was the successful offeror. After receiving notice on November 1, 2006, EMW, Inc. (EMW), the unsuccessful offeror, filed a size protest with the CO on November 7, 2006. On November 7, 2006, the CO forwarded the protest to the Small Business Administration (SBA) Washington Metropolitan Area District Office, which then forwarded the protest to the SBA Area II Office of Government Contracting in Philadelphia, Pennsylvania (Area Office) on November 8, 2007.

On January 16, 2007, the Area Office issued Size Determination No. 2-2007-18 (the size determination), finding Appellant to be other than small for the subject procurement. Appellant received the size determination on January 18, 2007, and filed its appeal on February 2, 2007.

The U.S. Small Business Administration Office of Hearings and Appeals (OHA) decides

size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issues

Whether the Area Office made a clear error of fact or law when it determined Appellant was other than small because it was unusually reliant upon an other than small incumbent contractor in violation of the ostensible subcontractor rule.

Whether an agreement for the prime contractor to provide the subcontractor with replacement revenues based on 50% of the value of the labor the prime will realize on the instant contract with positions on other prime contracts:

a. Impeaches the prime's claim of performing 51% of the work; or

b. Violates the ostensible subcontractor rule.

III. Facts and Parties' Arguments

A. Findings of Fact

1. On August 6, 2004, USSS issued a solicitation for contractor services for facilities management as a 100% 8(a) small business set-aside. The RFP required the successful offeror to provide facilities management computer-related services and supplies, *e.g.*, computer operations, systems software support, customer support, and telecommunications support. The CO designated North American Industry Classification System (NAICS) code 541513, Computer Facilities Management Services, with a corresponding $18 million size standard,[1] as the applicable NAICS code for this procurement.

2. Section B (Price Schedule) of the RFP contains the pricing schedule offerors were to utilize in making their offer. It provides:

a. Offerors were to price the Labor Cost Schedule (starting on page 6) using the estimated hours provided by the USSS. That is, offerors were to offer unit prices for the various categories of labor listed under the Contract Line Items (CLINs) and then multiply each unit price by the number of hours estimated by the USSS to reach an extended price. Then, the offerors were to total the extended prices to calculate a total labor dollar amount for the base year and each option year;

b. Beginning on page 15, offerors were to price computer hardware for hardware maintenance (for the base and option years) utilizing a list of IBM and other vendor computer parts under various CLINs. Offerors were to provide unit costs on a monthly basis to be multiplied into an annual cost and then an extended cost which was to be totaled for the base

[1] The size standard for procurements issued after December 5, 2005 for NAICS code 541513 is $23 million.

year and each option year; and

c. Starting on page 29, offerors were to price software maintenance (by site and for base and option years) utilizing a list of IBM and other provider software under various CLINs. Offerors were to estimate monthly costs and follow the instructions to reach an extended cost for each CLIN which was then to be totaled for each year.

3. Appellant is a small business concern for the applicable NAICS code and an SBA 8(a) certified firm.

4. Paradigm Solutions Corporation (Paradigm), the incumbent contractor and proposed subcontractor, has graduated from the 8(a) program and is a large company. Paradigm is ineligible to compete as a prime contractor on the instant solicitation.

5. On August 19, 2004, Appellant and Paradigm executed a Teaming Agreement to define "the parties' respective responsibilities relative to the USSS Facilities Management Contract (hereinafter 'Program')." The Agreement was prepared on Paradigm letterhead.

6. Paragraph 2.1 of the Teaming Agreement states:

> 2.1 It is the intent of Paradigm and Access to team to prepare and submit a proposal for the Program. Subject to your agreement as provided herein, it is understood that Access will take the Prime position and Paradigm will take the Sub-Contractor position for the purpose of submitting a proposal for the stated Program. Access will name Paradigm as the proposed subcontractor under the Program for the tasks specified in Attachment A entitled "Statement of Work".

7. Attachment A (the Statement of Work or SOW) to the Teaming Agreement between Appellant and Paradigm provides, in pertinent part, as follows:

> Teaming Rules:
>
> 1. Paradigm agrees to staff task orders/contracts associated with its areas of responsibility in a timely manner with qualified personnel….Based on the envisioned areas of responsibility to be performed by Paradigm, [Appellant] agrees that Paradigm's work scope will equate to 49% of the total *labor* revenues with [Appellant] providing 51% of the *labor* revenues.
>
> . . .
>
> 3. [Appellant] agrees to a handling fee of 1% and Paradigm agrees to a 2% handling fee, for a total handling fee to USSS of 3% for CLINS other than labor. For labor, a maximum of 3% will be used on Paradigm's labor.
>
> 4. [Appellant] agrees that Paradigm will retain the Hardware, Software, Ancillary, and Parts, Supplies, and Equipment portions of the contract since

> Paradigm has the relationships with all vendors used for this program.
>
> . . .
>
> 6. [Appellant] agrees to provide Paradigm with replacement revenues based on 50% of the value of the labor [Appellant] will realize on this program with positions on other Access contracts.

(emphasis added).

8. Appellant submitted its Proposal to the USSS on October 15, 2004. Consistent with the requirements of Section B of the RFP, Appellant priced its offer for the base and option years of the contract. Appellant's proposed Labor Schedules constitute approximately 53% of its total offered price. However, the Hardware and Software Maintenance Prices Appellant proposed constitute approximately 85% of its labor costs and approximately 45% of the grand total Appellant proposed.

9. Appellant's Proposal makes frequent references to the "ACCESS-Paradigm Team" and does not differentiate on a cost basis what work Appellant would perform. Nor does Appellant's Proposal explain or detail what work Appellant would perform versus what work Paradigm would perform. In addition, Appellant placed significant emphasis on the qualifications of Paradigm to perform the work and Paradigm's importance, for example:

a. In the Executive Summary to its proposal, at E-1, Appellant stated:

> The ACCESS-Paradigm Team--ACCESS has selected Paradigm Solutions Corporation (Paradigm), the IRMD Incumbent, to serve as our subcontractor on this project. Our *partnering* with Paradigm and the transition *of all of the key management staff members* to ACCESS, including Mr. Don Jordon, offers the USSS the benefits of *Paradigm's five years of experience with IRMD*--directly supporting its operating environment and technical infrastructure--and retention of IRMD corporate knowledge.

(emphasis added).

b. The Proposal repeatedly refers to the ACCESS-Paradigm Team as "we" and provides, "The ACCESS-Paradigm Team provides a full discussion of *our* corporate personnel policies . . . . " (emphasis added); and

c. Half of the work Appellant cited for past performance was performed by Paradigm. Proposal, Section IV, Past Performance Information, starting at IV-1.

10. Appellant identified eight Key Personnel: seven of these eight key personnel were Paradigm employees at the time Appellant submitted its Proposal, including the Program Manager, Operations Manager, and three shift supervisors. Appellant did not propose any of its current employees as key personnel. Proposal, at I-12.

11. On October 31, 2006, the CO notified unsuccessful offerors that the apparent successful offeror was Appellant. On November 7, 2006, EMW, an unsuccessful offeror, filed a timely size protest with the CO (EMW received the CO's notification letter on November 1, 2006).

12. EMW's protest alleged that Appellant was unduly reliant upon its subcontractor, Paradigm, and that Paradigm would perform the primary and vital requirements of the solicitation, including facilities management, help desk, and software development in an IBM mainframe environment. EMW also alleged that Paradigm appeared to have targeted Appellant as a teaming partner so that it could continue to perform on a contract that Paradigm was no longer eligible to compete for as a prime contractor. Therefore, EMW argued that Appellant and Paradigm were affiliated and that Appellant was ineligible for the contract award.

13. On November 8, 2006, the CO forwarded the protest to the Area Office. On November 16, 2006, the Area Office informed Appellant of the protest, and requested it submit a response to the protest, together with a completed SBA Form 355 and certain other information. On December 2, 2006, Appellant responded to the protest and filed the requested information.

14. On February 7, 2007, I issued a Protective Order, covering material Appellant submitted to the Area Office; Appellant's Appeal Petition; Amended Appeal Petition, and accompanying exhibits; any future pleadings that refer to these materials; and the final decision in this matter, if it refers to these materials. On February 9, 2007, I admitted counsel for EMW under the Protective Order.

B. Size Determination

On January 16, 2007, the Area Office issued its size determination finding Appellant to be other than a small business for the instant procurement. The Area Office based the size determination upon the following salient facts:

a. Appellant is an SBA 8(a) certified firm. Paradigm, the incumbent contractor for this procurement, is a graduate of the 8(a) program and is a large, publicly-traded company. There is no mentor-protégé agreement between Appellant and Paradigm;

b. Paradigm's Form 10-K, filed with the Securities and Exchange Commission (SEC) on March 31, 2006, indicated that it was in financial risk due to the loss of 8(a) eligibility. Paradigm indicated that it would pursue 8(a) work as a subcontractor/team member with a small concern serving as the prime contractor;

c. The Teaming Agreement (including the SOW) between Appellant and Paradigm was prepared on Paradigm letterhead. The SOW provides that Appellant's work would equate to 51% of the labor revenues and Paradigm's would equate to 49% of labor revenues;[2]

[2] The Area Office did not note that the 51% ACCESS, 49% Paradigm breakdown included only total labor revenues.

d. Appellant uses the term "ACCESS-Paradigm Team" throughout its Technical Proposal. In addition, the Technical Proposal lists eight key employees, seven of whom were Paradigm employees (including the Project Manager, Operations Manager, and three shift supervisors) working on the incumbent procurement. None of Appellant's proposed key personnel are presently employed by Appellant. Appellant's Proposal emphasizes the lack of a learning curve (due to Paradigm's experience) and that it has commitments from 15 members of the current staff supporting the USSS; and

e. The Cost Proposal does not break down the cost of the work to be performed by Appellant and Paradigm.

The Area Office stated that while it is permissible for a prime contractor to seek to augment its abilities by hiring a subcontractor, the tasks performed by the subcontractor must be segregated and discrete. The Area Office reviewed Appellant's Technical Proposal, finding that the tasks assigned to Paradigm were not segregated and discrete. While the Teaming Agreement stipulated that Appellant would perform 51% of the contract, the Cost Proposal did not assign discrete tasks or assign costs to show that Appellant's personnel would perform more than 50% of the contract. Moreover, Appellant did not provide a breakdown of the work to be performed by its personnel or other evidence to support that Appellant would perform over 50% of the work or that it would perform the primary and vital requirements of the procurement. The Area Office also acknowledged that while it may be customary to hire an incumbent contractor's staff, a concern must still comply with the ostensible subcontractor rule. Here, seven of the eight proposed key personnel are current Paradigm employees and none of the proposed key personnel are current employees of Appellant. In addition, "there was no specific evidence submitted that current [Appellant] personnel are involved in the daily operations of the instant procurement." Size Determination, at 7.

Based upon the foregoing, the Area Office found Appellant unusually reliant upon Paradigm and thus in violation of the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). Accordingly, it found Appellant was engaged in a joint venture with Paradigm for this procurement and was thus other than small for this procurement.

C. The Appeal Petition

Appellant received the size determination on January 18, 2007. On February 2, 2007, Appellant filed the instant appeal.[3]

Appellant's core argument is that OHA should not rigidly apply the ostensible subcontractor rule, which was not intended to thwart legitimate 8(a) firms from "forming strategic business relationships with companies having favorable past performance with certain government agencies", but to inhibit "sham" alliances by other than small 8(a) companies. Appeal Petition, at 2 - 3. To do otherwise, Appellant argues, would ignore the customary

[3] On February 6, 2007, Appellant submitted an Amended Appeal Petition to correct typographical mistakes. All references herein will refer to the page numbers on the Amended Appeal Petition.

business practice of teaming with the outgoing incumbent contractor, in order for the Government agency to "retain corporate institutional memory and ensure a comfortable level of performance predictability." Appeal Petition, at 2.

Appellant begins by arguing that the Area Office failed to identify the primary and vital requirements of the contract pursuant to 13 C.F.R. § 121.103(h)(4) and failed to determine whether Appellant or Paradigm would perform these requirements. Appellant asserts that it is not improper for an 8(a) firm to seek a teaming relationship with an outgoing incumbent contractor (serving as the proposed subcontractor for the follow-on contract) as long as the 8(a) firm demonstrates it can perform the primary and vital requirements of the contract and is not unusually reliant on the proposed subcontractor. Appellant avers that the primary and vital requirements of the contract "pertain to contractor support services for facilities management tasks in support of the USSS Enterprise Computing Program . . . of IRMD, which had the responsibility for management and operation of two data centers, including software support, hardware system support, customer support services, applications development, and networking and telecommunications." Appeal Petition, at 11. This includes "contractor support in maintaining mainframes, creating software, managing OEM procurement and relocating major server/mainframe hub locations." *Id.*

Appellant asserts that it possessed the qualifications to perform these primary and vital requirements. Appellant then highlights its experience and qualifications, including (1) supporting the Marine Corps by providing software support, custom computer software development, design and programming, and software applications programming; (2) providing software database design and development support, quality assurance, IV&V services, and software security for the Veterans Administration ("the largest financial management system modernization in the world at that time"); (3) providing network support, integration, project management, and System Life Cycle Development support for the EPA; (4) maintaining IBM mainframes as a subcontractor under the Financial Management Service Enterprise Infrastructure Operations and Support Program with the Department of Treasury; and (5) providing the U.S. Joint Forces Command with procurement and acquisition management, business operations, IT specialist support, IBM mainframe support services, and technical, clerical, and administrative support services. Appeal Petition, at 11 - 12. Appellant maintains that it is independently qualified for the contract and did not need to hire Paradigm to augment its abilities; instead, it hired Paradigm because it had never done business with USSS before and wanted a competitive advantage by hiring the incumbent.

Appellant further asserts that the Record contradicts the Area Office's assertion that Appellant did not assign discrete and segregated tasks to Paradigm. Appellant maintains that its proposal provided that Appellant would be the single point of contact with the CO and that Appellant's Operations Vice President would be "the official face of the ACCESS Team." Appeal Petition, at 13. In addition, Appellant was responsible for training programs. Appellant also asserts that it would be performing the majority and the most complex aspects of the work under the contract, *e.g.*, by providing the majority of the total labor value for the contract while Paradigm provided employees for basic staff positions. Appellant would provide the Project Manager, Operations Manager, 100% of the Computer Operator Shift Supervisors, level three Computer Operators, IBM Senior Systems Programmers, Senior Systems Analysts QM, and the

Database Administrator. In contrast, Paradigm "was to provide the low level Help Desk Technicians, 80% of the level two Help Desk Technicians, and 60% of the level four Computer Operators." Appeal Petition, at 14.[4] In sum, Appellant "was to provide near 100% of the senior/managing employees as well as the employees that would be performing the most complex tasks." *Id.*

Appellant then counters the Area Office's assertion that Appellant had not demonstrated that it would perform more than 50% of the work. Appellant points out that the difficulty in analyzing the matter arises from the nature of the contract itself, *i.e.*, a contract dealing with "employee response to customer IT needs." Appeal Petition, at 16. Appellant asserts that the only way to divide the work is "through the employees and the type of work they will do" and Appellant provides a breakdown of the employee positions. *Id*. Further, Appellant's Proposal and Teaming Agreement set forth that Appellant would pay for more than 50% of the labor costs, which was the only way to ensure that Appellant would perform more than 50% of the work.

Appellant argues that the Area Office did not adequately perform a totality of the circumstances analysis, which would have required the Area Office to consider "pertinent information generated by [Appellant's] responses to the seven factors." Appeal Petition, at 16. Appellant asserts that if the Area Office had evaluated one of the seven factors (which firm chased the contract) the fact that Appellant chased the contract would have "stood the protestor's whole ostensible subcontractor theory on its head." Appeal Petition, at 17. Appellant contends that the Record reflects that Appellant pursued Paradigm to increase its chances for award, not the other way around. In other words, Paradigm did not pursue Appellant because it no longer could receive the award directly.

Appellant also distinguishes OHA caselaw cited by the Area Office by arguing that in the instant matter, Appellant prepared its proposal with little assistance from Paradigm and the USSS contract is in Appellant's area of expertise and "nothing in the record indicates that Paradigm does this work better than [Appellant]." Appeal Petition, at 14. Appellant reiterates that it hired Paradigm's employees to ensure continuity and to minimize the transition for the USSS. The hiring of Paradigm's employees was in the best interest of the USSS, "and if there is any reliance on Paradigm, it certainly was not 'unusual reliance', of the type reserved for those having little or none of its own qualifications." Appeal Petition, at 19. Appellant contends that any reliance on Paradigm was permissible because this is the "way business is done in the federal contracting world of today" and its technical proposal shows that "all lines of authority lead to [Appellant]." *Id.*

In its conclusion, Appellant asserts that "[t]o hold that it was 'unduly reliant' would be to ignore the strict language of the regulation, the compelling facts about [Appellant's] capabilities presented to the Area Office, small business best competitive bidding practice, and the reality of the government contract service industry." Appeal Petition, at 21.

[4] Although Appellant cites to its Teaming Agreement, Work Split Section, Ex. 3, this document does not contain this information.

D. The Protestor's Response

On February 13, 2007, I granted EMW an extension to file a response. On February 27, 2007, EMW timely filed its Response. EMW urges OHA to affirm the size determination because the Area Office did not commit an error of fact or law in concluding that Appellant and Paradigm are joint venturers, and affiliated for size purposes. Further, Paradigm will perform the primary and vital requirements of the contract and Appellant is unduly reliant upon Paradigm.

EMW argues that the Area Office properly applied the law to all the available and relevant facts. EMW asserts that the Area Office developed undisputed facts from Appellant's Teaming Agreement, Technical Proposal, and Cost Proposal to support its finding that Appellant is unduly reliant upon Paradigm. EMW asserts that 13 C.F.R. § 121.103(h)(4) mandates that the Area Office consider the Teaming Agreement, which, EMW asserts, shows that "Paradigm, in fact, initiated and crafted the terms of the teaming agreement." Response, at 10. To support its position that Appellant did not chase the contract, EMW asserts, regarding the Teaming Agreement: (1) it is written on Paradigm's letterhead; (2) the introductory paragraph identifies Paradigm first; (3) the signature portion identifies Appellant as the subcontractor; (4) it assigns 49% of the labor revenue from the contract to Paradigm, the maximum permissible amount; and (5) Paradigm will retain the hardware, software, supplies, and equipment.

Next, EMW asserts that the Area Office properly considered Appellant's emphasis upon the ACCESS-Paradigm Team in its Proposal and Appellant's failure to differentiate between the two team members. EMW maintains that the Technical and Cost Proposals repeatedly reference the "ACCESS-Paradigm Team," as opposed to Appellant individually, *e.g.*, 66 references in Appellant's Technical Proposal refer to the Team versus 15 references to Appellant individually. Moreover, the Technical Proposal repeatedly mentions Paradigm individually to "tout the fact that the Team brings the expertise of the incumbent and its staff to the contract." Response, at 13. EMW counters Appellant's assertion that it prepared 95% of its Proposal by highlighting that every page displays both Appellant and Paradigm's logo and references to the ACCESS-Paradigm Team. In addition to the difficulty in distinguishing between Appellant and Paradigm in the Technical Proposal, EMW asserts that the Cost Proposal does not break down costs between the prime and subcontractors. EMW then cites OHA caselaw that affirmed area office findings of ostensible subcontractor affiliation when the proposal emphasizes a team approach to performance.

EMW asserts that the Area Office properly considered Appellant's dependence upon the incumbent's staff, noting that none of Appellant's proposed key personnel are currently employed by Appellant and that all but one (Mr. Gregg, an InfoPro employee) are current employees of Paradigm. Specifically, EMW notes that the proposed Project Manager (PM) is a current Paradigm employee and the PM on the incumbent contract. EMW asserts that OHA has long held that the hiring of a substantial number of the incumbent subcontractor's employees constitutes strong indicia of affiliation (citing *Size Appeal of the Analysis Group, LLC,* SBA No. SIZ-4814 (2006)). Further, EMW argues that the fact that Appellant intends to hire Paradigm's employees directly after contract award does not change the fact that Appellant is reliant upon Paradigm to perform the primary and vital requirements of the solicitation.

EMW also asserts that the Area Office properly considered Paradigm's role as the incumbent contractor. Specifically, the Area Office considered Paradigm's Form 10-K filed with the SEC, which, EMW asserts, shows Paradigm's financial dependency on 8(a) contracts with the federal Government and its strategy for incumbency leveraging. EMW argues the "10-K is highly probative in this case where [Appellant] insists that it pursued Paradigm and not vice versa." Response, at 24. At the very least, EMW asserts "there was little chasing to be done in that Paradigm was anxiously awaiting the opportunity to pursue the follow-on contract." Response, at 24.

EMW argues that Appellant's breakdown of work is misleading and irrelevant. EMW avers that "[t]he Appeal Petition cites to numerous percentages from an undated chart that breaks down work between the prime and subcontractor" to confuse OHA into thinking Appellant will be performing the primary and vital tasks. Response, at 24 (citing Appeal Petition, at 14). EMW asserts that Appellant "erroneously indicates that these percentages were pulled from the 'Work Split Section' of the parties' Teaming Agreement . . . . [but] the Teaming Agreement does not even include a 'Work Split Section.'" Response, at 25. Instead, the chart "apparently originated from a letter to SBA during the size protest in response to a request for information from the Area Office . . . . But, it was not included as part of the Technical Proposal or the Teaming Agreement as the Appeal Petition asserts." Response, at 26 (emphasis in original). Further, EMW asserts that the Teaming Agreement does not indicate which positions will be held by Appellant or Paradigm nor which positions are senior or basic in nature; it merely stipulates that Appellant will perform 51% of the contract.

Another issue EMW addresses is the fact that the chart indicates that 28 out of 53 positions will be filled by the prime. However, EMW notes that at least 7 employees are acknowledged Paradigm employees (Technical Proposal, at I-11, I-19), one is a current InfoPro employee (Technical Proposal, at I-9, I-12), and the Technical Proposal (ES-1) states that "14 of the current full-time incumbent staff have already signed letters of commitment." EMW then queries "whether any of the 28 employees to be provided by [Appellant] are actually currently [employed] by [Appellant] and how many are currently employed by Paradigm?" Response, at 27. In addition, EMW asserts that the chart does not indicate which firm will provide the SA01, Senior Systems Analyst, CP01 Senior Communications Programmer, or the CP02 LAN Support Programmers. EMW also claims that while the hiring of an incumbent's employees may be common, OHA has held that such practice is nonetheless a strong indicia of affiliation.

In addition, EMW asserts that even if Appellant is found to perform the primary and vital requirements, such a finding would not preclude the conclusion that Paradigm is an ostensible subcontractor. Under the ostensible subcontractor rule, an ostensible subcontractor is one who performs the primary and vital requirements or a subcontractor upon which the prime contractor is unusually reliant. 13 C.F.R. § 121.103(h)(4). EMW argues that Appellant is unduly reliant upon Paradigm and that Appellant's attempt to prove otherwise, by stressing that Appellant would be the point of contact for the Government, is unpersuasive. EMW accepts that Appellant is the contract awardee and "it is self-evident that [Appellant] will be the point of contact with the Government . . . . [H]owever, the very person who will act as the point of contact with the Government is [Appellant's] proposed Project Manager, Mr. Jordan, the incumbent Project

Manager currently working for Paradigm." Response, at 29 - 30. EMW also argues that it is irrelevant to the undue reliance issue that Appellant will provide training because training is not a requirement of the contract; "[t]he critical task is to actually hire and retain qualified individuals who meet the Government's requirements – a task for which [Appellant] is unduly reliant upon Paradigm." Response, at 30.

Then EMW counters Appellant's argument that the Area Office never identified the primary and vital requirements of the solicitation by arguing that Appellant's proposal identified "virtually no task whatsoever that would be performed by [Appellant] alone." Response, at 33. Therefore, "the Area Office could reach only one conclusion – that all tasks – including those that were vital and primary – would be performed by the ACCESS-Paradigm Team or Paradigm individually." *Id.*

EMW concludes by arguing "if [Appellant] was fully able to perform this contract and only relied upon Paradigm to maximize its chances of winning this contract . . . why are none of [Appellant's] current employees proposed as key employees in the proposal?" Response, at 31. Likewise, "[i]f [Appellant] is as experienced at performing similar work, why doesn't [Appellant] slot any of its own employees to work on this contract?" *Id.* Lastly, "if [Appellant] does not need Paradigm . . . why did [Appellant] contract away its right to almost half of the labor revenue of the contract . . . to Paradigm?" Response, at 32.

E. Appellant's Reply

On March 2, 2007, I granted Appellant leave to file a Reply to the Response, which Appellant timely filed on March 9, 2007.

Appellant reiterates that the Area Office failed to identify the primary and vital requirements of the contract. Appellant defines the primary and vital requirements as managing IT tasks and argues the Area Office ignored the Past Performance section of Appellant's Proposal, which established Appellant's "impeccable qualifications" to perform these requirements. Reply, at 2. Instead, the Area Office placed too much emphasis on the Teaming Agreement when OHA has ruled that the proposal is a better source. *See Size Appeal of FDR, Inc.*, SBA No. SIZ-4781, at 15 (2006). Appellant asserts that the Area Office should have examined Appellant's Proposal before determining whether Appellant was unusually reliant on Paradigm.

Appellant further argued that the Area Office and EMW placed "highly questionable emphasis" on Paradigm's 10-K, which should not have been germane to the totality of the circumstances analysis. Reply, at 4. Appellant maintains that "similar or verbatim language [regarding strategies to maintain federal Government business] exists in the strategic or business plans of every 8(a) firm facing graduation . . . . Paradigm is not plotting an evil scheme or making a public confession in making such a statement." Reply, at 4. Further, such statements are not evidence that Paradigm pursued Appellant as a teaming partner; instead, Appellant pursued Paradigm.

Appellant next challenges EMW's alleged assertion that the multiple references to the

ACCESS-Paradigm Team, in its Proposal, demonstrates Appellant did not prepare its Proposal. Appellant states that it has its own proposal writing team with a lead proposal writer, which prepared 95% of the Proposal. Further, an OHA case that relied on multiple references to the "team" to support undue reliance involved a challenged firm with minimal qualifications that it needed to supplement. Appellant argues its situation is distinguishable because it had sufficient qualifications and merely referenced the "team" to demonstrate to the Government that it "would meet the agency's desire for continuity of business operations, retention of corporate knowledge, and minimal performance risk through transition." Reply, at 5.

Appellant then asserts that if its breakdown of Paradigm versus Appellant employee tasks was "'confusing' or 'misleading' . . . it is due to the lack of a definition of primary and vital tasks by the Area Office against which [Appellant] could demonstrate that its employees would be performing." Reply, at 6. Appellant maintains that the contract is "one of management rather than tasks" and its Proposal states that Appellant's Vice President for Operations can dismiss or replace any managers. *Id.* Therefore, Appellant's current employee would be evaluating the management team members. Finally, Appellant asserts that it has won identical contracts to the instant solicitation without Paradigm as a team member, indicating that Appellant "is not now and never has been unduly reliant on Paradigm and that Paradigm is not an ostensible subcontractor." Reply, at 7.

IV. Discussion

A. Introduction

My initial observation is that the Area Office made no errors of fact that harm Appellant. Nor does Appellant refute the facts found by the Area Office. Instead, Appellant argues the facts found by the Area Office do not support a violation of the ostensible subcontractor rule.

My next observation is that the size determination does not rely upon a finding that Paradigm is performing primary and vital requirements of the contract, although that is arguably so.[5] Rather, the size determination is more directed at unusual reliance because it does not discuss in detail the tasks Paradigm would perform beyond generally finding Paradigm would retain the Hardware, Software, Ancillary, and Parts, Supplies, and Equipment portions of the contract. In any event, the Area Office could have concluded Appellant did not plan to perform any primary and vital tasks because: (1) Appellant identified no tasks it would perform alone; and (2) the RFP requires offerors to specifically price the Hardware and Software work (constituting 45% of Appellant's pricing proposal, *see* Fact 8), which makes them primary and vital contract requirements that were not specifically assigned to Appellant.

I also note that I have found additional facts supporting the size determination. Specifically, I have found facts causing me to hold the Teaming Agreement between Appellant and Paradigm demonstrates a violation of the ostensible subcontractor rule because the provisions of the Agreement indicate a discrepancy in bargaining power with Paradigm dictating the terms of the Agreement. Based upon this transparent inequality, the terms of Appellant's

[5] *See* Fact 8, which indicates Paradigm will perform a large part of the contract.

Teaming Agreement indicate that Appellant is unusually reliant upon Paradigm in violation of 13 C.F.R. § 121.103(h)(4).

B. Applicable Law

1. Timeliness

An appeal must be filed within 15 days of receipt of a size determination. 13 C.F.R. § 134.304(a)(1).

2. Standard of Review

The standard of review for size appeals is whether the Area Office based its size determination upon a clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. (*See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review.) Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office erred in making a key finding of law or fact. Thus, I must evaluate whether the Area Office: (1) Properly considered available and relevant facts; (2) Evaluated the arguments of the parties; and (3) Correctly applied the regulations and law to the relevant facts in making its size determination.

In applying this standard of review, I find it important to note that mere imperfections or harmless error in a size determination is insufficient to constitute clear error. Further, merely because one may have decided the case differently does not mean there was a clear error.

3. Applicable Regulations

SBA predicates its affiliation regulations upon the power of one concern to control another. 13 C.F.R. § 121.103(a). One independent basis of control area offices must consider is the ostensible subcontractor rule, which provides:

> A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, *or a subcontractor upon which the prime contractor is unusually reliant*. *All aspects* of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), *agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement)*, and *whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation*.

13 C.F.R. § 121.103(h)(4) (emphasis added).

The purpose of the rule is to prevent other than small firms from forming relationships with small firms to evade SBA's size requirements. The ostensible subcontractor rule permits the Area Office to determine a subcontractor and a prime have formed a joint venture (and are thus affiliates) for determining size. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract or a subcontractor upon which the prime contractor is unusually reliant. 13 C.F.R. § 121.103(h)(4).

In determining whether there is a violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4) requires area offices to consider "*all aspects*" of the relationship between the prime and the subcontractor. As explained in *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817, at 16-17 (2006) (*Lance Bailey*), "*all aspects*" is equivalent to considering the totality of the circumstances, but unlike a finding of affiliation based upon the totality of the circumstances under 13 C.F.R. § 121.103(a)(5), affiliation based on the ostensible subcontractor rule applies only to the contract at issue and not to the concern's status for future procurements.

C. Analysis

1. Timeliness

Appellant appealed the size determination within 15 days of receiving it. Therefore, Appellant's appeal is timely. 13 C.F.R. § 134.304(a)(1).

2. Is Appellant Unusually Reliant Upon Paradigm?

a. The Facts Found by the Area Office Support a Finding of Unusual Reliance

The Area Office found a violation of the ostensible subcontractor rule based upon the following facts:

i. Paradigm is the incumbent contractor and is ineligible to submit an offer under the RFP but Appellant is eligible;

ii. Paradigm formed a strategy to retain Government work by being a subcontractor on 8(a) set-aside procurements;

iii. References to the "ACCESS-Paradigm Team" predominate Appellant's Proposal;

iv. Seven of the eight key employees (including the PM) are Paradigm employees and none are current employees of Appellant;

v. Paradigm would be performing a significant percentage of the work under the contract (at least 49%); and

vi. Appellant did not segregate discrete tasks to be performed by Paradigm in its

Proposal.

As the Area Office correctly stated, similar facts have justified findings that the ostensible subcontractor rule has been violated. *See, e.g., Lance Bailey* at 17; *Size Appeal of TKC Technology Solutions, LLC*, SBA No. SIZ-4783 (2006); *Size Appeal of SecTek, Inc.*, SBA No. SIZ-4558 (2003); *Size Appeal of General Maintenance Engineering, Inc.*, SBA No. SIZ-4405 (2000); *Size Appeal of KIRA, Inc.*, SBA No. SIZ-4360 (1999); and *Size Appeal of Business Control Systems, Inc.*, SBA No. SIZ-3959 (1994).

In reviewing Appellant's Appeal Petition, I am not immune to Appellant's argument that the hiring of the incumbent's employees by a successful follow-on offeror is permissible and desirable. Nor am I saying an incumbent cannot be a subcontractor or that a prime cannot hire the incumbent's employees to ease the Government's transition. But the facts here go beyond merely hiring some of the incumbent's employees. Instead, Appellant emphasizes Paradigm's work experience over its own and proposes to utilize current Paradigm employees for seven of the eight key personnel positions. In addition, Appellant does not propose its own current personnel for *any* of the key positions.

The Area Office did not conclude that Appellant was not qualified to perform the contract but rather that there was no way to discern Appellant's qualifications or the amount of work it would be performing from reading its Proposal and Teaming Agreement. This inability to discern Appellant's qualifications or level of effort is because Appellant emphasized the qualifications of Paradigm's employees and failed to assign discrete tasks or costs to show that Appellant's employees would perform more than 50% of the work (Fact 9).

Appellant's proposal makes no differentiation between itself and Paradigm. Instead, it constantly refers to the ACCESS-Paradigm team, to "we" to describe effort or plans and to "our" this or that (Fact 9). Given the pervasive nature of these references, I find these references are probative evidence of unusual reliance.

In its Appeal Petition, Appellant asserts that the Area Office failed to consider the "Work Split Section" of the parties' Teaming Agreement (a chart indicating whether the prime's or the subcontractor's personnel would perform various personnel positions), which Appellant asserts indicates the actual tasks to be performed by Paradigm personnel and therefore shows Appellant would perform the majority of the total labor value of the contract. *See* Appeal Petition, Ex. 5. However, the work split information was not included as part of the Teaming Agreement or as an attachment to the Teaming Agreement or the Proposal. It is an undated chart (without the Teaming Agreement's letterhead) that apparently was provided to the Area Office during the size protest (not part of the Teaming Agreement in the Record, as Appellant asserts).

Regardless, the breakdown of labor roles in the work split section is misleading because the chart identifies employees as "prime", *e.g.*, the PM, when the employees are current Paradigm employees and it leaves certain positions (LAN Support Programmers) blank. Therefore, I do not find that this chart accurately represents a breakdown of discrete tasks or that it proves Appellant will perform the majority of the total labor value of the contract. I also find unpersuasive Appellant's contention that because Appellant is providing training and Appellant's

Operations VP will be the single point of contact, there are assigned discrete tasks to be performed by Appellant. Training is not a contract requirement and it is unclear how the Operations VP will interact with the PM, a current Paradigm employee.

My view of the size determination is that the Area Office considered "all aspects" of the relationship between Appellant and Paradigm that the Area Office could identify. Having done this, it becomes relevant whether the facts it found support its conclusion of unusual reliance. I hold that the facts found by the Area Office, in combination with the requirement, in 13 C.F.R. § 121.103(h)(4), that the Area Office *must* consider Paradigm's incumbent and ineligible status, are probative of unusual reliance. Accordingly, it would be error for me to second-guess the Area Office's finding of unusual reliance. Thus its determination that Appellant is other than small because it is affiliated with Paradigm for this procurement is not based upon a clear error of fact or law. 13 C.F.R. § 134.314.

b. The Teaming Agreement Further Exemplifies Unusual Reliance

The Area Office is specifically required to consider the Teaming Agreement in determining whether there was a violation of the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4).

The Teaming Agreement does not provide that Appellant is to perform 51% of the work under the contract and Paradigm 49%. Rather, Attachment A, Teaming Rule 1, provides that "Paradigm's work scope will equate to 49% of the total labor revenues with [Appellant] providing 51% of the labor revenues" (Fact 7). Teaming Rule 4 provides that Paradigm will "retain the Hardware, Software, Ancillary, and Parts, Supplies, and Equipment portions of the contract" because "Paradigm has the relationships with all vendors used for this program."

These provisions raise doubts as to whether Appellant actually would perform 51% of the work and whether Appellant would perform the primary and vital requirements of the contract. A possible interpretation of Paradigm's reservation for itself, in the Teaming Agreement, of the hardware and software requirements is that Paradigm is performing the primary and vital contract requirements by being responsible for 70% (or more) of the price of the contract.[6] Thus, based upon the dollar value of Appellant's offer price for labor and Hardware and Software Maintenance, I conclude that it is possible that Paradigm might be performing more than 50% of the value of the work required by the contract and Appellant less than 50%.

I interpret Teaming Rule 6 (Fact 7) to mean that Appellant agreed to replace labor revenues Paradigm lost because it was ineligible to be prime under the present contract with 50%

[6] The basis for the 70% estimate is that Appellant's Proposal includes Labor Schedules at about 53% of its total offered price, and Hardware and Software Maintenance Prices at about 45% of its total offered price (Fact 8). Since Paradigm would perform 49% of the labor (or 26% of the proposed contract price) (Teaming Rule 1) and all of the Hardware and Software Maintenance (45% of the proposed contract price), the sum of Paradigm's Labor, Hardware, and Software effort is about 70% of the proposed contract price.

of the value of the labor Appellant would perform under the contract. The agreed-upon method for replacing this revenue was for Appellant to provide Paradigm with positions under Appellant's other contracts.[7]

Teaming Rule 6 is problematic in that it shows that Paradigm holds the balance of power in its relationship with Appellant, *i.e.*, Paradigm has more leverage in the relationship. This kind of agreement, based upon how much Appellant had to give up, suggests strongly that Appellant's primary contribution to the Teaming Agreement is its 8(a) status. Accordingly, based upon Teaming Rule 6, I find that Appellant is unusually reliant upon Paradigm as a matter of law.

Moreover, Teaming Rule 6 raises serious questions about how Appellant will actually realize 51% of the revenue from the USSS contract when it had to agree to give 50% of the labor revenue away. The agreement to transfer revenue to Paradigm arguably means that Appellant cannot realize 51% of the revenue because it promised to give 50% of the labor revenue to Paradigm. I consider this matter to be particularly troubling because it gives the appearance of a maneuver designed to take advantage of Appellant's 8(a) status.

Teaming Rule 6 raises issues of first impression. Nevertheless, under the circumstances, I hold that when the Record establishes there is an agreement requiring a putative prime to replace a substantial amount of an incumbent subcontractor's "lost revenue" (revenue lost or unrealized because it was ineligible under a solicitation) by giving that incumbent other business, there is a presumption that the putative prime is unusually reliant upon the subcontractor. Accordingly, in addition to any other reason found herein, I find Appellant is unusually reliant upon Paradigm because Teaming Rule 6 requires Appellant to replace a substantial amount of the labor revenue Paradigm would not realize under the instant contract because it is ineligible to submit an offer.

As I noted, I found the issues relating to the Teaming Agreement independent of the Area Office's size determination. However, they support the outcome that there was a violation of the ostensible subcontractor rule and were I not to have found the Area Office decided correctly or that Teaming Rule 6 is a per se violation of the ostensible subcontractor rule, I would have remanded the issues raised by Teaming Rules 1 and 4 to the Area Office for their action.

D. Summary

The Area Office made no clear errors of fact. The facts found by the Area Office support a finding that Appellant is unusually reliant upon Paradigm for various reasons that include:

a. Paradigm is the incumbent contractor and is ineligible to submit an offer under the RFP but Appellant is eligible;

b. Paradigm formed a strategy to retain Government work by being a subcontractor on 8(a) set-aside procurements;

[7] The Record (Appellant's Past Performance examples) indicates that a significant portion of Appellant's revenue comes from its performance of Government contracts.

c. References to the "ACCESS-Paradigm Team" predominate Appellant's Proposal;

d. Seven of the eight key employees (including the PM) are Paradigm employees and none are current employees of Appellant;

e. Paradigm would be performing a significant percentage of the work under the contract (at least 49%); and

f. Appellant did not segregate discrete tasks to be performed by Paradigm in its Proposal.

The critical fact in this appeal is that Paradigm is the incumbent contractor. Paradigm's incumbency makes the other facts found by the Area Office acutely relevant. *See* 13 C.F.R. § 121.103(h)(4). In addition, Paradigm's incumbency triggers my finding that Teaming Rule 6 is a per se violation of the ostensible subcontractor rule.

Based upon these facts, I cannot find the Area Office made a clear error of fact or law in finding Appellant unusually reliant upon Paradigm and thus affiliated with Paradigm under the ostensible subcontractor rule.

In addition to the foregoing, I find that although not specifically addressed by the Area Office, provisions of the Teaming Agreement are probative of unusual reliance. Accordingly, were I not affirming the size determination, I would have remanded this appeal to the Area Office to address issues raised by Teaming Rules 1 and 4, since I did not rule upon them in my analysis of the Teaming Agreement. However, I do find that Teaming Rule 6, by itself, is probative of unusual reliance and constitutes a violation of the ostensible subcontractor rule.

V. Conclusion

I have considered Appellant's Petition, the applicable law and the Record. The Record supports the Area Office's determination that there has been a violation of the ostensible subcontractor rule and that Appellant essentially formed a joint venture with Paradigm for this procurement. Therefore, the Area Office did not base its size determination upon a clear error of fact or law when it determined Appellant was other than a small concern for this procurement.

Consequently, the size determination is AFFIRMED. Appellant's appeal is DENIED.

This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge